SUPREME COURT, U. S.

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74-1494

IN

THE SUPREME COURT OF THE UNITED STATES

October Term 1974

* *

DRAYTON CURRY,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

* *

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

* *

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The petitioner Drayton Curry respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on April 3, 1975.

OPINION BELOW

The opinion of the Court of Appeals appears in Appendix I hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on April 3, 1975. Petition for rehearing was denied on April 29, 1975. This petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Was defendant denied a fair trial by the Court instructing the jury both prior to trial and in the charge that two co-defendants, co-conspirators and alleged purchasers had entered pleas of nolo contendere to the same indictment under which defendant was being charged?

2. Was the defendant prejudiced by requiring defendant's motions made pursuant to the Jencks Act to be made in the presence of the jury and by the Court's instructing the jury concerning the Jencks Act?

3. Does the denial of a tendered instruction require further objection by defendant pursuant to

Rule 30, Federal Rules of Criminal Procedure?

4. Was defendant prejudiced by the failure of the Government to produce all statements of the witness, Sutton, pursuant to a timely Jencks Act request?

STATUTORY PROVISIONS INVOLVED

1. 18 U.S.C. Section 3500 as set out in Appendix III.

2. Rule 30, Federal Rules of Criminal Procedure, as set out in Appendix IV.

STATEMENT OF THE CASE

The defendant was tried and convicted by a jury in the Eastern District of North Carolina, Elizabeth City Division, at the December 3, 1973 Term upon his plea of not guilty to a six count Bill of Indictment charging conspiracy, possession with intent to distribute heroin (2 counts) and distribution of heroin (3 counts). From a verdict of guilty as to defendant and active sentence imposed, defendant gave notice of appeal.

Prior to filing the appeal, defendant moved

for a New Trial alleging various improprieties by the Government at defendant's trial. The trial court considered the Motion as primarily dealing with violations of the Jencks Act and found the violation non-prejudicial.

The Court of Appeals for the Fourth Circuit, while reversing the conviction of defendant's co-defendant, affirmed his conviction. (Case No. 74-1097 was remanded for resentencing.)

DISTRICT COURT JURISDICTION

Defendant was tried in the District Court pursuant to 21 U.S.C. Sections 841(a)(1) and 846.

REASONS FOR GRANTING THE WRIT

1. THERE IS A CONFLICT IN THE CIRCUITS REGARDING INFORMING THE JURY OF THE DISPOSITION OF THE CASES OF CO-DEFENDANTS.

Defendant was charged with conspiracy and substantive offenses, all dealing with heroin. Four co-defendants were named in the indictment. All were co-conspirators. Two co-defendants entered pleas of nolo contendere pursuant to a plea bargain. (They received sentences to be served

concurrent with sentences previously imposed.) The two who entered pleas, Willie Curry and Swinson, were also alleged purchasers of heroin from defendant. Neither testified at the trial. All the primary Government witnesses were unindicted co-conspirators and were afforded immunity. The trial court twice informed the jury of the pleas of nolo contendere.

In the case sub judice, the defendant's guilt and the guilt of the other defendants, including the two who entered pleas were closely connected. They all allegedly met together, dealt together and sold heroin to one another. The indictment itself states these facts. "In a case such as this one, in which it appears from the indictment that the guilt of each defendant is closely tied to that of the others, the court should not needlessly tell the jury the results of a prior trial." United States v. Womack, 454 F.2d 1337,1346 (5th Cir. 1972).

No reason exists to inform the jury of the disposition of co-defendants' cases. No limiting

instruction can realistically be said to remove prejudice. The remaining defendants are inalterably prejudiced. Especially, where as here, there is evidence that the other defendant being tried has a reputation for dealing in drugs,[1] reversible prejudicial error is committed when the jury is told that the co-defendants, co-conspirators, purchasers do not even contest the facts as presented by other co-conspirators given immunity.

As the Fourth Circuit is not in agreement with the Fifth Circuit, certiorari should lie to resolve their differences.

2. THE DECISION BELOW CALLS FOR THE EXERCISE OF THE COURT'S SUPERVISORY POWERS.

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[1] The admission of this evidence over the objection of both defendants entitled the defendant Manley a new trial. The Court of Appeals held such error to be non-prejudicial to the defendant Curry.

a.

The trial court twice told the jury that the remaining defendants in the indictment had entered pleas of no contest or nolo contendere to the charges. (Trial App. 26, 59-60). The co-defendants were also co-conspirators. These same men were the alleged purchasers of heroin from defendant in Counts III and IV of the indictment. From the face of the indictment it appears that the guilt of each defendant is closely tied to that of the others. Yet, the jury was instructed, not one, but twice, that the two co-defendants, co-conspirators and purchasers did not contest the facts of the Government's case.

The Court of Appeals seemed to agree that the instruction was not to be preferred, but found no prejudicial error as a further instruction cured any harm. (Slip opinion, p. 8). No reason exists to so prejudice a defendant. It has been held that the refusal to advise the jury of the acquittal

of a co-defendant is not error.[2] How can it be argued that advising the jury of a guilty or nolo plea of a co-defendant is not error.

There must be uniformity in the Federal System. This Court has the power to create a simple, easily followed rule regarding instructions on pleas of co-defendants. The present case is the perfect vehicle to discuss and decide such a rule.

b.

While no per se rule exists, it is clear that the better practice is to hear Jencks Act motions and make any appropriate disclosures outside the presence of the jury. United States v. Frazier, 479 F.2d 983 (2nd Cir. 1973); Beaudine v. United States, 414 F.2d 397 (5th Cir. 1969); United States v. Neilson, 392 F.2d 849 (7th Cir. 1968); Gregory v. United States, 369 F.2d 185 (D.C. 1966). The rationale of the rule is to prevent the jury from drawing an inference that the statement or

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[2] United States v. Plante, 472 F.2d 829 (1st Cir. 1973).

statements received are consistent with the testimony elicited on direct examination.

Most of the cited cases take a case to case approach, i.e., prejudice depends upon the particular circumstances of each case. But as the court stated in United States v. Gardin, 382 F.2d 601,604 (2nd Cir. 1967), the "fair and just administration of criminal prosecutions might well be better served if the proceeding for the production of Jencks Act statements or reports were to take place out of the presence of the jury when the defendant requests that this be done."

In the case sub judice, at the close of direct examination of the witnesses Sutton, Ben Brooks, Joan Brooks and Myles, discussions concerning Jencks Act disclosures were made in the presence of the jury.[3] Only once was counsel able to make

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[3] After direct examination of Sutton, counsel started to make a motion. He was interrupted, data was provided, and the jury was instructed as to the compliance with the Jencks Act. (Trial App. 27-28).

such request without interruption. (Trial App. 46-47), Supra. On that occasion, the request was denied and the court read the statute to the jury. Thus not only were the requests made in the presence of the jury, but also the jury was specifically instructed as to the meaning of the Act.

Counsel was able to elicit certain inconsistencies in the testimony of the Government witnesses at trial as compared to their Grand Jury testimony. Whether the jury inferred that the prior statements regarding other areas of testimony were consistent with the witnesses' testimony at trial is, of course, unknown. But no reason exists for permitting Jencks business to be

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After direct examination of Ben Brooks and in the presence of the jury Mr. Dean immediately volunteered the grand jury transcript and record of the witness. Again the jury was instructed as to the proceedings. (Trial App. 32-34).

After direct examination of Joan Brooks and in the presence of the jury, Mr. Dean again immediately volunteered Jencks information. The Court so stated prior to cross examination. (Trial App. 41-42).

conducted in the presence of the jury or the jury to be instructed as to the import of the proceedings. Stated conversely, "[w]e perceive no reason, other than to prejudice the defendant in the exercise of his Jencks Act rights, to require defense counsel to request and receive Jencks Act statements in the presence of the jury." Gregory v. United States, Supra, at p. 191.

The Court of Appeals apparently agreed with defendant's arguments but found some type of waiver. (Slip opinion, pp. 5-6). They held that the extensive use of the materials by the defense removed any unfavorable inferences which the jury may have drawn. It is a sad state of the law when defense attorneys are faced with the option of rolling over and playing dead to preserve a question on appeal or doing the best job possible under the

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After direct examination of Myles Counsel objected to the manner in which the Jencks disclosures were being conducted and stated the proceedings should be made in the absence of the jury. (Trial App. 46-47). The Court read the Jencks Act to the jury. (Trial App. 48).

circumstances and waiving any existing legal issue.

The circuits need guidance as to the procedures to be followed in proceedings pursuant to the Jencks Act. This case squarely presents the question for appropriate resolution.

c.

Defendant timely tendered instructions on both immunity and accomplices. (Trial App. 13-14). These instructions were rejected. The Court gave an accomplice instruction. No mention was made in reference to immunity given Government witnesses. No objection was made to the charge as given.

The Court of Appeals, no objection having been made, found no "plain error". Defendant contends that no reason exists for an objection to the failure to instruct on a rejected tendered instruction. After a tendered instruction is rejected both parties and the Court are aware that said instruction will not be given. Why require further objections?

This Court has the ultimate authority to

interpret the Federal Rules of Criminal Procedure. Defendant respectfully requests that Rule 30, Federal Rules of Criminal Procedure, be construed to require that no further objection by a party when the trial court rejects that party's tendered instruction(s).

d.

"Statements" producible under the Jencks Act were not produced. The trial and appellate courts found the violation of the Act non-prejudicial. Four competent, qualified, non-interested judicial officials have heard the tapes and found their lack of disclosure non-prejudicial.

Yet, the one person in the proceedings who is best qualified to determine their value or non-value, has not heard them. That person has seen a transcript of one tape and found it useful. That person, by doing his best to cross-examine without full disclosure apparently did too good a job. Without assistance from this Court that person will never know what was on the tapes and whether

it would be beneficial to the defense. That person[4] is defendant's attorney.

CONCLUSION

For the reasons stated above, the writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

RESPECTFULLY SUBMITTED,

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May 26, 1975.

[4] "[O]nly the defense is adequately equipped to determine the effective use for the purpose of discrediting the Government's witness and thereby furthering the accused's defense . . ." Jencks v. United States, 353 U.S. 657,668-669, 77 S.Ct. 1007,1013, 1 L.Ed.2d 1103 (1957).

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 74-1097

United States of America,

Appellee,

versus

Drayton Curry,

Appellant.

No. 74-1098

United States of America,

Appellee,

versus

Howard Langston Manley,

Appellant.

No. 74-1873

United States of America,

Appellee,

versus

Drayton Curry,

Appellant.

Appeals from the United States District Court for the Eastern District of North Carolina, at New Bern. John D. Larkins, Jr., District Judge.

Argued December 6, 1974. Decided April 3, 1975

Before BOREMAN, Senior Circuit Judge, WIDENER, Circuit Judge, and THOMSEN, Senior District Judge

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Neill H. Fleishman for Appellant in Nos. 74-1097 and 74-1873; Milton E. Moore (Regina A. Moore on brief) for Appellant in No. 74-1098; Joseph W. Dean, Assistant United States Attorney, (Thomas P. McNamara, United States Attorney, on brief) for Appellee in Nos. 74-1097, 74-1098, and 74-1873.

BOREMAN, Senior Circuit Judge:

These appeals stem from the convictions of Drayton Curry (No. 74-1097) and Howard Langston Manley (No. 74-1098) for numerous violations of federal drug laws. Since the appellants were tried together and their respective challenges to the judgments of conviction raise several identical legal issues, the appeals of those cases were consolidated. We have joined with those appeals consideration of the appeal by Curry from the district court's denial of his motion for a new trial (in No. 74-1873).

The Government's evidence, if believed, shows that in October 1972 appellant Curry, at the request of one Ellis Sutton who was then in prison, undertook to collect a debt owed by Ben and Joan Brooks to Sutton arising from a sale of heroin. At that time Curry offered to sell additional heroin to the Brookses. On October 29, 1972, the Brookses and others met with the appellants Curry and Manley and observed them distributing heroin. Four eye-witnesses testified to the transactions. One week later, on November 2, 1972, Curry and Manley offered to sell additional heroin to the Brookses - one-eighth of a kilo for $3600. Several hours later the Brookses, who were joined by one Tammy Myles, called Curry to set up the purchase. Curry agreed to sell the heroin. Manley then met the Brookses and Miss Myles at the place arranged by Curry and sold them the heroin. The Brookses and Miss Myles testified to the transaction. Two and one-half weeks later Myles made an $1800 purchase of heroin from Manley; Curry was not present at this transaction.

Appellant Curry assigns as error the district court's denial of his motion for a continuance. Such a motion is addressed to the sound discretion of the court and denial thereof is not error unless it constitutes an abuse of discretion. United States v. Inman, 483 F.2d 738 (4 Cir. 1973); United States v. Pigford, 461 F.2d 648 (4 Cir. 1972). Curry's counsel argues that he did not have adequate time in which to prepare a defense. The record demonstrates that Curry made no effort to retain trial counsel between August 20, 1973, at which time he retained counsel for purposes of representation at arraignment only, and November 27, 1973, just seven days prior to trial when he employed his present counsel. Had Curry acted

with reasonable dispatch in employing counsel for trial, no continuance need have been requested. Where the defendant has unreasonably delayed retention of counsel to represent him and such delay is the sole result of defendant's dilatory tactics it is not an abuse of discretion to deny a request for a continuance based upon an allegation that additional time would be "helpful" in preparing a defense. In any event, defense counsel did have seven days for preparation. We find no merit in this assignment of error.

Curry also charges that the court erred in denying his motion to sever his trial from that of appellant Manley. Specifically, Curry contends there was a misjoinder of defendants in violation of Rule 8(b), Federal Rules of Criminal Procedure. We reject this contention as without merit. The indictment charged and the evidence, if believed, proved that Curry and Manley jointly participated in the series of transactions charged, and they could, therefore, be joined pursuant to Rule 8(b). Although the court could have ordered separate trials pursuant to Rule 14, Fed.R.Crim.P., there was no persuasive reason urged or presented for doing so. Much of the evidence with respect to Manley which Curry argues was prejudicial to him would have been admissible against Curry even if he were tried separately since a conspiracy was alleged.[1]

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[1] The Government's evidence tended to show a single controlling conspiracy to make illicit sales of controlled substances and anything said or done by one of the conspirators during the existence of the conspiracy in furtherance of the common design is admissible as to all the conspirators. United States v. Sapperstein, 312 F.2d 694 (4 Cir. 1963). The Government's evidence, if believed, established

Both Curry and Manley assign as error the prosecutor's disclosure of Jencks Act material in the presence of the jury. We[2] are in agreement with the views of the Second,[3] Fifth,[4] Seventh,[5] and the District of Columbia, Circuits that, upon the request of counsel, Jencks Act disclosures should ordinarily be made outside the presence of the jury. We might be somewhat troubled that the prosecutor's actions in this respect were unduly emphasized by the trial court when it read the Jencks Act to the jury. However, careful review of the record reveals that no objection was made to the prosecutor's actions until late in the trial and after this procedure had been followed repeatedly without objection. The trial court read the Act to the jury on that occasion so they might better understand the nature of the dispute between counsel and to preclude any inference by the jurors that evidence was being withheld from

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a single conspiracy involving both appellants of which the alleged transactions were a part; hence, we are not faced with the kind of prejudice we warned against in United States v. Vaught, 485 F.2d 320 (4 Cir. 1973) where one of the offenses charged was not part of a conspiracy involving all the defendants and evidence thereof was inadmissible against those not involved. See James v. United States, 416 F.2d 467 (5 Cir. 1969).

2. United States v. Frazier, 479 F.2d 983 (2nd Cir. 1973).

3. Beaudine v. United States, 414 F.2d 397 (5 Cir. 1969).

4. United States v. Neilson, 392 F.2d 849 (7 Cir. 1968).

5. Johnson v. United States, 347 F.2d 803 (D.C. Cir. 1965).

them. Additionally, we note that defense counsel made frequent reference to the Jencks Act material while cross-examining witnesses; this procedure made the existence of the material known to the jury and precluded any objectional inference of the type which the court found sufficient to require reversal in Gregory v. United States, 369 F.2d 185 (D.C. Cir. 1966).[6] See United States v. Gardin, 382 F.2d 601, 605-606 2 Cir. 1967).[7] In light of all the circumstances we conclude that any error in this respect was harmless.

Both Curry and Manley object to the court's failure to instruct the jury regarding the weight

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6. In Gregory v. United States, 369 F.2d 185 (D. C. Cir. 1966), the court held it was error for the trial court to require defense counsel to make a Jencks Act motion in the presence of the jury since it might lead the jury to infer that the material represents prior consistent statements unless it was used to cross-examine the witness. Since the Jencks Act material in the instant case was used extensively by the defense in cross-examination any unfavorable inference which the jury may have drawn was invited by the defense.

7. There may be merit in the procedure for handling Jencks Act material outlined by the Second Circuit in United States v. Gardin, 382 F.2d 601 (2 Cir. 1967). As that case points out, in appropriate circumstances it is entirely proper for the jury to be informed that Jencks Act material has been provided to the defense. That procedure may possibly reduce the likelihood that the jury will draw inferences prejudicial to either side.

to be accorded the testimony of a witness who has been granted immunity. No timely objection was made to the judge's charge and reversal is warranted only if the error is "plain error." See United States v. King, 420 F.2d 946,947 (4 Cir. 1970). Since all witnesses who were granted immunity were accomplices and since the court instructed the jury that the testimony of an accomplice is "to be received with caution and weighed with great care," the jury were thus instructed to give their testimony special scrutiny. The jurors were informed of those witnesses who had been granted immunity and were given a general instruction on the credibility of witnesses which told them to consider the "interest" of each witness in the outcome of the case and whether each witness has "any motive or reason for being truthful or untruthful in his testimony." In view of these facts, we conclude that the court's failure to give an instruction specifically relating to the weight to be accorded the testimony of a witness who had been granted immunity was not "plain error" which would command reversal.

The court told the jury on two occasions that Willie Curry and Willie Swinson, who were originally co-defendants in this case and whose names appeared in the indictment, had entered pleas of nolo contendre to the charge in the first count, and would not be tried with the others. Appellants concede "an aura of mystery would be present if no explanation at all were given to the absence of co-defendants" but suggest that the jury should not be told that the co-defendants had entered pleas of nolo contendere. While it might be preferable to tell the jury only that the case against the co-defendants had been disposed of previously and that they had been eliminated from the present trial, it was not error, under the circumstances, to reveal to the jury the pleas of the original co-defendants. Wood v. United States,

279 F.2d 359 (8 Cir. 1960). Any prejudice which might have arisen from this information was cured when the court told the jury not to consider those pleas "in any manner as relates to these defendants," and specifically instructed that "it is not to be taken as [evidence] of any guilt of the remaining defendants on trial."

Both Manley and Curry objected to the following question posed by the prosecutor to Sheriff Broughton, a government rebuttal witness, and moved to strike the response:

> Q. Do you know what his [Manley's] character and reputation is for dealing in drugs?
>
> A. About a year ago I had information he was dealing in drugs.

The court overruled the objections and denied the motions to strike. For the reasons to be stated we agree that the question was improper and that the court erred in denying Manley's motion to strike the answer.

The question is faulty in that it seeks to inquire about the sheriff's "knowledge" of the "character" of the defendant. "Since the whole inquiry . . . is calculated to ascertain the general talk of people about defendant, rather than the witness' own knowledge of him, the form of inquiry 'Have you heard?' has general approval, and 'Do you know?' is not allowed." Michelson v. United States, 335 U.S. 469, 482 (1948) (footnote omitted). Additionally, the question is directed to the "character" as well as the "reputation" of the defendant; the permissible inquiry is limited to the reputation of the accused, what those in the community perceive him to be, and not his character, what he actually is. Torcia, Wharton's Criminal Evidence Section

230 (13th ed. 1972).

The question to the sheriff and the response thereto were clearly improper. There is no indication that the sheriff's information was the consensus of opinion of the defendant's reputation in the relevant community. If the source of that information was a police report or some other nonpublic source it is not admissible to show the defendant's reputation.[8] A witness called by the prosecution to rebut the defendant's evidence of his good reputation can only testify as to the consensus of opinion about the defendant which he has heard circulating in the relevant community

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8. In Eley v. United States, 117 F.2d 526 (6 Cir. 1941), the prosecution attempted to rebut the the defendant's evidence of his good reputation by showing other unrelated convictions and other specific acts which tended to denote bad character and would normally create a bad reputation. In reversing the conviction because of the admission of such rebuttal testimony, the appellate court stated, at page 529:

> "We are unable to follow the reasoning of the court which led it to admit the challenged evidence not to establish specific acts but for the limited purpose of showing the general reputation of the defendant. There was no proof that the prior convictions and the subsequent unlawful acts of the appellant were known to the community, or that they in any wise impaired the reputation of the appellant as a man of honesty and integrity . . . ."

concerning the defendant.

Whether by inadvertence or design, the Government's examination of Sheriff Broughton allowed him to make a personal and vindictive attack upon the "character" of the accused. Although the court did exclude part of the Sheriff's intemperate remarks,[10] his testimony was more

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9. It is desirable in this connection to note the difference between one's reputation and a rumor about the person. Professor Wigmore has suggested two distinctions between reputation and rumor which may account for admission of the former but not of the latter on direct examination. "On the one hand, reputation implies the definite and final formulation of opinion by the community; while rumor implies merely a report that is not yet finally credited. On the other hand, a rumor is usually thought of as signifying a particular act or occurrence, while a reputation is predicated upon a general trait of character. . . ." 5 J.Wigmore, Evidence Section 1611 (3rd ed. 1940). The sheriff's answer in the instant case appears to refer to a rumor rather than to the defendant's reputation.

10. When the prosecutor asked Sheriff Broughton about Manley's general character and reputation, the Sheriff responded, "I would say bad, he would do anything to make a fast dollar." Manley's objection and the motion to strike were overruled and the Sheriff repeated his answer in a more distinct fashion. The next day the court ordered that the comment be stricken and told the jury to disregard it. In view of our ultimate disposition we need not decide whether this belated curative instruction was sufficient.

inflammatory than informative.

We are also troubled by the narrow scope of the prosecutor's question. Where the prosecution seeks through its own rebuttal witnesses to challenge the defendant's evidence of his own good general reputation it is limited to showing his bad general reputation.[11] Of course, the prosecutor is free upon cross-examination to inquire of the defendant's reputation witnesses whether they have heard particular rumors about the

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11. The following quotation from United States v. Lewis, 482 F.2d 632 (D.C. Cir. 1973), addresses this point:

> "The accused may elect to advance one or more of his character traits as evidence of his innocence. If he does, his proof is confined to evidence of his reputation in the community for those traits. His presentation, in terms of number of such traits, may be narrow or as broad as he chooses so long as it remains germane to issues on trial. . . .
>
> "The Government's options as to character-proof depend upon what the accused undertakes to do. . . .
>
> The prosecutor cannot offer bad-character evidence unless the accused first introduces evidence of good character; even then, the prosecutor's proof is restricted to community reputation, and to the trait or traits to which the accused's own character evidence related."

defendant or have heard about specific instances of misconduct on his part[12] but such inquiries are for the purpose of revealing inconsistencies between what the witness has heard and the conclusion about the defendant's reputation which the witness expressed upon direct examination, and not for the purpose of proving the defendant's bad reputation.[13] While narrow questions about specific traits of the accused are proper rebuttal in some circumstances,[14] the prosecution is not permitted to elicit testimony from its own rebuttal witnesses concerning specific traits of the defendant for the sole purpose of repudiating the defendant's evidence of his general reputation.[15] Evidence of a specific trait is

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Id. at 637-638 (footnotes omitted).

12. Michelson v. United States, 335 U.S. 469 (1948).

13. Shimon v. United States, 352 F.2d 449, 453-454 (D.C. Cir. 1965); Mannix v. United States, 140 F.2d 250, 252 (4 Cir. 1944).

14. Where evidence of a particular trait is offered for some purpose other than to rebut the defendant's evidence of his good general reputation it may be admissible. See Aaron v. United States, 397 F.2d 584 (5 Cir. 1968) (Government's evidence of defendant's bad reputation limited to specific traits put in issue by the defendant); United States v. Fink, 502 F.2d 1, 5-6 (5 Cir. 1974) (Evidence of defendant's reputation as a drug smuggler admitted to show predisposition to commit the crime and thereby rebut entrapment defense).

15. Cf. United States v. Harrell, 436 F.2d 606 (5 Cir. 1970); Salgado v. United States, 278 F.2d 830 (1 Cir. 1960).

not sufficiently relevant to the defendant's general reputation to outweigh the likelihood that such evidence will prejudice the defendant by characterizing him as the type of person who is likely to commit the particular crime charged.

We conclude that the court erred in overruling Manley's objection to the prosecutor's question and in denying his motion to strike the answer. The probability that this improper evidence unduly influenced the jury and denied Manley a fair trial is so great that we cannot treat the error as harmless. We think that the conviction of Manley must be set aside and that he is entitled to a new trial.

Although this evidence was so prejudicial to Manley that he is entitled to a new trial we do not believe that it resulted in prejudice to Curry. The jurors were instructed that, "Each defendant is entitled to have his case determined from his own acts and statements, and the other evidence in the case which may be applicable to him," and were warned that "the fact that you may find one defendant guilty should not control your verdict as to the other defendant."

However, we find merit in Curry's contention that his sentence is improper because it imposes consecutive sentences for two offenses which, under the facts of this case, merge into a single offense. In United States v. Atkinson, et al, Nos. 74-1034 and 74-1035 (February 24, 1975), decided by this court subsequent to the trial of this case and its presentation on appeal, we held that where there is no evidence of possession on appeal with intent to distribute a controlled substance apart from evidence of the actual transfer of the substance pursuant to a sale, the offenses of possession with intent to distribute, 21 U.S.C. Section 841(a)(1), and distribution,

21 U.S.C. Section 841(a)(1), merge into a single offense. In the instant case the evidence of the sale was relied upon to prove Curry's "intent to distribute" at the time of his possession. The gravamen of each offense is the distribution of a controlled substance: when the intent is carried out by a successful sale the offenses merge. To paraphrase the language of the Supreme Court on a similar point, we hold, therefore, that when Congress made either distribution or possession with intent to distribute a crime it intended that the maximum punishment for distribution should remain at fifteen years but, even if the culprit should fall short of accomplishing his purpose, he could be imprisoned for fifteen years for possessing with the felonious intent. See Prince v. United States, 352 U.S. 322, 329 (1957). In light of our conclusion concerning the consecutive sentences imposed on Curry this case will be remanded to the district court for the purpose of resentencing.

No useful purpose would be served by discussion of the other alleged errors cited by appellants. We have carefully examined them and are not persuaded that they require reversal. Nor are we persuaded by Curry's contention that the cumulative effect of those alleged errors plus the other alleged errors discussed previously requires a reversal of his conviction. It has been said that there is no such thing as a perfect trial. It is seldom possible to conduct a trial free of error; innocent mistakes of a technical and inconsequential nature occur in the most carefully planned and skillfully conducted trials. The law does not require that a trial be free of error; it only requires that the trial be fair and free of prejudice to the defendant. Our review of the proceedings below convinces us that any error therein was harmless with respect to appellant Curry and that his conviction, subject to resentencing, must be affirmed.

Curry prosecutes a separate appeal from the district court's denial of his motion for a new trial. Curry asserts that subsequent to his trial he learned of the existence of several tape recordings of government agents' conversations with Ellis Sutton who was a government witness in the instant case. Apparently those conversations were had primarily with respect to another case and another trial and, although the Assistant United States Attorney who tried the instant case was present at some of those conversations and knew of the existence of three of the tapes, he was unaware of the tapes of the other conversations. The Assistant United States Attorney states that the three tapes of conversations which he knew existed were not presented pursuant to Curry's Jencks Act motion because (1) the tapes were never transcribed, (2) the tapes did not form the basis for any indictment or information, (3) all information in those conversations at which the Assistant United States Attorney was present which he believed relevant to appellant Curry was furnished to Curry's counsel in the form of handwritten notes, and (4) most of the contents of those tapes were unrelated to Sutton's testimony at trial.

The district court made an in camera examination of all nine tapes and concluded that one short segment of one of the tapes contained incidental references to Curry. That particular tape was one of the three tapes known to exist by the Assistant United States Attorney who, as the district court noted, "upon feeling they were not relevant erroneously made the decision not to mention them." In an unreported opinion the district court made a thorough examination of the case law and concluded that since the information revealed by the relevant portion of

that tape was identical to information which had previously been supplied to the defense by way of the transcript of Sutton's grand jury testimony, any error in failing to reveal the contents of that tape to the defense was harmless. This court has made an independent review of that particular tape and concludes that the district court was correct in its determination that the error was harmless. We believe that the vigorous cross-examination of Sutton by defense counsel, the availability of Sutton's grand jury testimony, and the fact that Sutton's testimony at trial did not directly implicate Curry places this case within that narrow group of cases where an unintentional violation of the Jencks Act should be excused. See United States v. Missler, 414 F. 2d 1293 (4 Cir. 1969).

For the foregoing reasons, we affirm Curry's conviction and remand for resentencing in No. 74-1097; we reverse Manley's conviction and remand for a new trial in No. 74-1098; we affirm the district court's denial of Curry's motion for a new trial in No. 74-1873.

APPENDIX II

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 74-1097

United States of America,

Appellee,

versus

Drayton Curry,

Appellant.

ORDER

Appellant, Drayton Curry, has filed his petition for rehearing or, in the alternative, suggesting a rehearing in banc.

No member of the court in regular active service has requested a poll on the suggestion of rehearing in banc and the members of the panel having considered the petition it is, with the consent and approval of Judge Widener and Senior District Judge Thomsen,

ORDERED that the petition for rehearing be and the same hereby is denied.

/s/ Herbert S. Boreman

A True Copy, Teste:

William K. Slate, II, Clerk

By: /s/ F. (illegible)
Deputy Clerk

(Filed April 29, 1975)

18 United States Code Section 3500. Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court incamera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such materials excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such

withholding and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means --

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechancial, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

APPENDIX IV

Rule 30.

INSTRUCTIONS

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The Court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury, and on request of any party, out of the presence of the jury.

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of May, 1975 and on the 24th day of June, 1975, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to JOSEPH W. DEAN, Assistant United States Attorney, Post Office Box 26897, Raleigh, North Carolina, and to SOLICITOR GENERAL, Counsel for the Government, Department of Justice, Washington, D. C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1494

DRAYTON CURRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (1) that the trial court prejudiced his right to a fair trial by informing the jury of the *nolo contendere* pleas of two co-defendants, (2) that the court erred by allowing the government to furnish Jencks Act material in the presence of the jury, (3) that he was prejudiced by the government's failure to produce all requested Jencks Act material, and (4) that it was error for the trial court not to give his requested instruction regarding witnesses who had been granted immunity.

On June 5, 1973, petitioner was indicted with three others in a six-count indictment charging conspiracy to possess heroin with intent to distribute it, possession of heroin with intent to distribute it, and distribution of heroin, in violation of 21 U.S.C. 841(a)(1) and 846. Following a jury trial in the United States District Court for

the Eastern District of North Carolina, petitioner was convicted on all counts and sentenced to a total of 30 years' imprisonment, to be followed by three years' special parole on each of the six counts. The court of appeals affirmed the convictions but remanded for resentencing (Pet. App. 1-16).[1]

The evidence at trial showed that in October 1972, Ellis Sutton, Jr., who was then in prison, asked petitioner to collect a $600 debt that Ben and Joan Brooks owed to Sutton for the purchase of heroin; petitioner agreed to do so (Tr. 11-17). While collecting the debt, petitioner told the Brookses that, although Sutton had no more heroin, petitioner could supply additional drugs (Tr. 50-52, 113-114). On October 29, 1972, the Brookses and others met petitioner and co-defendant Howard Manley at a motel in Hertford, North Carolina, where they observed petitioner and Manley distribute approximately one-quarter kilo of heroin (Tr. 56-62, 115-122). On November 2, 1972, petitioner and Manley visited the Brookses and Tommy Myles in Fayetteville to negotiate the sale of one-eighth kilo of heroin for $3,600 (Tr. 64-67, 123-125). Later that day, the Brookses and Myles telephoned petitioner, who told them that they would be taken care of. Manley then delivered one-eighth kilo of heroin to the Brookses at their motel in Hertford and was paid $3,600 (Tr. 68-70, 125-127).

1. The indictment named petitioner and three co-defendants. One co-defendant, William Swinson, pleaded *nolo contendere* approximately four months prior to trial. A second co-defendant, Willie Curry, pleaded *nolo contendere* during the noon recess on the day the case was called for trial (but before any evidence had been taken), after the jury had been excused from the courtroom. Trial proceeded against petitioner and co-defendant

[1]Petitioner has not yet been resentenced.

Howard Langston Manley. In his opening remarks and again in his closing instructions, the trial judge informed the jury of the *nolo contendere* pleas of co-defendants Swinson and Willie Curry (Tr. 4, 484-485). Petitioner objected to the trial court's instruction (Tr. 472-473, 519).

Petitioner claims that the trial court substantially prejudiced his right to a fair trial by informing the jury of the *nolo contendere* pleas of two co-defendants. However, in order to avoid possible confusion, it was appropriate for the trial judge to explain to the jury why two persons named in the indictment submitted to it—and particularly the one whom the jury may have seen at the defense table at the outset of trial but not thereafter—were not tried with petitioner. The carefully framed cautionary instruction, that the *nolo contendere* pleas of the absent co-defendants were not to be taken as evidence of petitioner's guilt (see Tr. 4, 484-485), amply insulated petitioner from any potential prejudice. See, *e.g., United States* v. *Aldridge,* 484 F.2d 655 (C.A. 7), certiorari denied *sub nom. Good* v. *United States,* 415 U.S. 921; *United States* v. *Earley,* 482 F.2d 53 (C.A. 10), certiorari denied, 414 U.S. 1111; *United States* v. *Aronson,* 319 F.2d 48 (C.A. 2), certiorari denied, 375 U.S. 920; *Wood* v. *United States,* 279 F.2d 359 (C.A. 8).[2]

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[2] *United States* v. *Womack,* 454 F.2d 1337, 1346 (C.A. 5), relied upon by petitioner, does not require a different result. There the trial court's decision to inform the jury of the prior conviction of two others named with appellant in five counts of an indictment was held improper (but not necessarily reversible error standing alone) because the guilt of appellant was closely tied to that of his two convicted associates with whom he was intimately involved in a complex scheme to defraud a federally insured savings institution. Here, on the other hand, petitioner was charged with possessing and distributing heroin in five counts of the indictment, while Swinson and Willie Curry were charged in only one count as co-conspirators who purchased the heroin. Thus, the jury's knowledge of the purchasers' guilt, provided in conjunction with extensive cautionary instructions, did not prejudice petitioner. Moreover, in *Womack,* the court agreed that where one of multiple defendants pleads guilty after the commencement of trial (as in effect occurred here in the case of co-defendant Willie Curry), the trial judge might be required to explain that the co-defendant's sudden absence from the courtroom during trial resulted from his guilty plea.

2. Petitioner contends that the trial court committed prejudicial error by allowing the government to furnish Jencks Act material in the presence of the jury, to whom the court then explained the Jencks Act.

While it might ordinarily be better practice for the defense to request Jencks material and the government to produce it in the absence of the jury, the first Jencks request in this case—following the direct examination of Ellis Sutton, Jr.—was made by petitioner's counsel in the jury's presence. Having been asked for Jencks material in open court, the government produced it in open court, and the trial judge, in an effort to keep the jury apprised, briefly explained the Jencks procedure to the jury; petitioner did not object (Tr. 20-21).[3]

Moreover, once petitioner's counsel made use of the Jencks material to cross-examine government witnesses, it was entirely appropriate for the jury to be advised of the source of this material. As the Second Circuit stated in *United States* v. *Gardin*, 382 F.2d 601, 605, upon which petitioner relies:

> * * * If, thereafter, the defendant decides to make use of any of the material for cross-examination of the witness, he will be permitted to do so only upon condition that he state preliminarily to the court and jury that he is about to question the witness on the basis of a written statement or report which the Government has made available to the defendant as required

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[3]Subsequently, following the direct examination of Ben Brooks and Joan Brooks, the government voluntarily surrendered transcripts of each witness's grand jury testimony in the presence of the jury. Petitioner again failed to object to this procedure (Tr. 74-75, 131). After the government's questioning of Tommy Myles, petitioner's counsel entered his first objection to the government's submission of Jencks Act materials in the presence of the jury (Tr. 203). At that time the trial court again briefly explained the requirements of the Jencks Act (Tr. 206). No further Jencks Act materials were supplied in the jury's presence.

> by law. This is to negative any inference that the Government had been covering something up * * * .

As the court below noted (Pet. App. 5-6), in the circumstances of this case there was no likelihood of prejudice from the Jencks procedures employed by the trial court; and thus the court did not abuse its discretion by allowing the government to furnish Jencks material in the jury's presence. See, *e.g., United States* v. *Gonzalez,* 466 F.2d 1286 (C.A. 5); *United States* v. *Nielsen,* 392 F.2d 849 (C.A. 7); *United States* v. *Gardin, supra,* 382 F.2d at 605, n.5.

3. Petitioner next claims prejudice from the government's alleged failure to produce several tape recordings of government interviews with witness Ellis Sutton, Jr. However, all tapes of which petitioner now complains were provided to the trial court for an *in camera* inspection on petitioner's motion for a new trial. After reviewing the tapes, the trial court concluded that only one short segment of one of the tapes contained incidental references to petitioner. The court held that the information on the tapes was substantially identical to that provided petitioner by the government in written transcripts of Sutton's grand jury testimony, and that petitioner therefore could show no prejudice from the government's unintentional failure to provide the tapes at trial.

The court of appeals made an independent review of the tape which contained a brief reference to petitioner and concluded that the trial court was correct in its determination that the government's failure to produce the tapes was, at most, harmless error (Pet. App. 16).

Since Sutton's testimony concerning petitioner's debt collection efforts did not directly implicate petitioner and since only minor differences distinguished the unfurnished tapes from Sutton's grand jury testimony and written statements which were provided to petitioner's counsel, no material improvement in counsel's cross-examination

would have been achieved by knowledge or use of the tapes. Petitioner can show no prejudice requiring reversal. See *United States* v. *Missler*, 414 F.2d 1293, 1303-1304, (C.A. 4), certiorari denied, 397 U.S. 913.

4. At the conclusion of the trial, petitioner asked the trial court to instruct the jury to scrutinize carefully the testimony of witnesses who testified under a grant of immunity. The court declined to instruct as petitioner requested; petitioner made no further objection after the court's charge.

While the trial court did not instruct the jury to scrutinize carefully the testimony of all witnesses who were granted immunity, as petitioner requested, it did instruct that the testimony of an accomplice is "to be received with caution and weighted [*sic*] with great care" (Tr. 508). Since all witnesses who were granted immunity were also accomplices, the jury was effectively instructed to examine carefully the testimony of all witnesses who had been granted immunity. Thus, the substance of petitioner's requested instruction was given, and any error in the failure to give a more specific instruction was harmless.[4]

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[4]The court of appeals held (Pet. App. 7) that on appeal petitioner was required to demonstrate "plain error" because he had not objected to the trial court's instructions after the court had charged the jury. Petitioner argues here (Pet. 12) that after having tendered an instruction that was rejected, he was required to do no more. However, there is authority for the proposition that Rule 30, Fed. R. Crim. P., requires a further objection even by a defendant whose requested instruction has been denied, unless a reviewing court finds that the denial constitutes plain error. See *United States* v. *Leach*, 427 F.2d 1107, 1113 n. 6 (C.A. 1), certiorari denied, 400 U.S. 829; *United States* v. *Taglianetti*, 456 F.2d 1055, 1056-1057 (C.A. 1). Whether this is the proper view of the interrelationship between Rules 30 and 52 of the Federal Rules of Criminal Procedure is irrelevant in this case, however; for, as we have demonstrated, the error, if any, was harmless.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1975.